

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

**IN RE: INCRETIN-BASED  
THERAPIES PRODUCTS  
LIABILITY LITIGATION**

**CASE NO. 13md2452-AJB (MDD)  
ORDER ON DISCOVERY  
DISPUTE REGARDING FACT  
SHEETS  
(ECF NO. 226)**

On December 19, 2013, the parties filed an Amended Joint Submission Regarding Plaintiffs' And Defendants' Fact Sheets (ECF No. 226). In the submission, the parties bring before the Court two disputes: 1. Plaintiffs seek relief from the requirement that they provide a detailed Plaintiff's Fact Sheet in every case filed in this Multi-District Litigation and any related case in this Court; and 2. A dispute regarding a proposed Defendant's Fact Sheet. Plaintiffs' obligation to file Fact Sheets has been stayed pending resolution of this dispute. (ECF No. 200).

**1. Plaintiff's Fact Sheet**

The Plaintiff's Fact Sheet ("PFS") was the product of negotiations between the parties with some assistance from the Court. The parties filed a Joint Motion Submitting Plaintiff Fact Sheet on May 3, 2013 which was implemented by Order of the Court on June 17, 2013, in one of

1 the early filed cases. *Scott v. Merck & Co., Inc., et al.*, 12cv2549, ECF  
2 Nos. 31, 33. It was expressly intended to apply to all related cases filed  
3 in this District. (*Id.*)

4 Plaintiffs assert that the PFS has proven to be unduly burdensome  
5 and propose a “Short Form Plaintiff Fact Sheet” be used in its place.  
6 Plaintiffs suggest that the Short Form is sufficient for the parties to use  
7 in determining appropriate cases for in-depth discovery as potential  
8 bellweather trials. The original PFS, they agree, can be completed in the  
9 cases selected for in-depth treatment.

10 Defendants assert that the original PFS is essential in evaluating  
11 the cases for bellweather treatment. In particular, Defendants state that  
12 the PFS was intended to obviate the need for protracted written  
13 discovery directed to each Plaintiff and that the information requested is  
14 required as early as possible considering the disease at issue here,  
15 pancreatic cancer, often is terminal. According to Defendants, the Short  
16 Form proposed by Plaintiffs is insufficient for their needs.

17 The Court finds good cause lacking to modify the negotiated PFS.  
18 The process of negotiating the PFS was protracted, involved the same  
19 experienced counsel for both sides and some guidance from the Court. To  
20 the extent that the real issue concerns the deficiency notices issued by  
21 Defendants after review of a PFS, the Order implementing the PFS has a  
22 detailed dispute procedure. The parties are welcome to discuss that  
23 between themselves and, if no agreement can be reached to modify that  
24 aspect of the Order, can bring the matter before the Court. As it now  
25 stands, however, the dispute before the Court only regards whether to  
26 institute a Short Form PFS in place of the original PFS reserving the use  
27 of the original PFS for cases selected for in-depth discovery and  
28 bellweather trials. On that issue, the Court finds for Defendants.

1           2. Defendant's Fact Sheet

2           Also before the Court is a dispute over a proposed Defendant's Fact  
3 Sheet ("DFS"). It appears that Defendants are not adverse to providing a  
4 DFS; the dispute is over timing and the scope of the DFS.

5           Defendants assert that the DFS is not intended as a counterpart to  
6 the PFS. The PFS likely is the only early discovery to be provided by the  
7 individual Plaintiffs unless and until their cases are selected for more  
8 detailed review. Defendants state that they are providing substantial  
9 discovery to Plaintiffs; the DFS only serves as a supplement. Defendants  
10 assert that the DFS should be focused on information regarding specific  
11 Plaintiffs and should not encompass generic discovery being handled  
12 through more traditional avenues.

13           The Court agrees with the Defendants regarding the nature and  
14 scope of the DFS. Unfortunately, that does not settle the matter. For  
15 that, the Court must consider each disputed item.

16           First, however, there is the question of timing. The motion leaves  
17 open the issue regarding whether the DFS is to be provided in all cases  
18 or only in cases selected for more detailed treatment. A third alternative  
19 is for the DFS to be two-tiered: provide basic information in a DFS to be  
20 provided in all cases followed by a more detailed exposition for cases  
21 selected for detailed review. Essentially, this is what the Plaintiffs were  
22 looking for with a short form PFS. The question is whether this  
23 approach, rejected by the Court in the PFS context, works for the DFS.  
24 The Court finds that the parties should address that issue and decide for  
25 themselves. The Court will provide some guidance in ruling on the  
26 disputed items below.

27           A. Sources of Information

28           The first dispute concerns whether Defendants must search beyond

1 their reasonably accessible databases into custodial files maintained by  
2 individual sales representatives to complete the DFS. Defendants assert  
3 that this level of search is unduly burdensome at this stage of the  
4 litigation. Defendants appear agreeable to providing a DFS in all cases if  
5 their search for information is limited to their databases and also appear  
6 agreeable to providing results from a search of custodial files for cases  
7 selected for more detailed review.

8 The Court finds that if the parties agree that a DFS is necessary  
9 early in the case, that Defendants need produce responsive information  
10 from its readily accessible databases. Defendants must search and  
11 provide responsive information from custodial files only in cases selected  
12 for detailed review. The parties may choose to agree that the detailed  
13 DFS is all that is necessary and only in cases selected for detailed review.

14  
15 B. Relevant Time Period

16 Plaintiffs want the time period for DFS information to start from  
17 the date of FDA approval of the medication and end with the due date of  
18 the PFS for each Plaintiff. Defendants want the time period to run from  
19 the date of the launch of each medication to the end date of each  
20 Plaintiff's prescription period for each product, as determined from  
21 Plaintiff's prescription records.

22 Plaintiffs want the longer period just in case there may some  
23 relevant information available prior to product launch and after each  
24 lawsuit was filed. Defendants want more certainty regarding the time  
25 periods covered and want to rely on prescription records to identify when  
26 each Plaintiff was provided the subject medication.

27 This "dispute" should have been resolved by the parties. Having  
28 thrown up their hands and left it to the Court, the Court finds

1 Defendants' position to be more reasonable.

2 C. Plaintiff-Specific Advertising

3 Plaintiffs want Defendants to determine whether they advertised  
4 their medications in the "media market" in which each Plaintiff lived at  
5 the time the Plaintiff used a subject medication (apart from national  
6 advertising). Defendants assert that this sort of discovery is best  
7 handled generally and not by using a Plaintiff-by-Plaintiff approach.

8 The Court agrees with Defendant that this sort of discovery is best  
9 handled on an MDL-wide approach and not case-by-case.

10 D. Document Requests

11 In connection with the DFS, Plaintiffs request the production of a  
12 variety of documents. Defendants object that Plaintiffs do need require  
13 this information with every DFS. There are six categories of documents  
14 at issue. (*See* ECF No. 226 at 10). Two of the requests are easy to  
15 dispose of: Request number 10, seeking copies of advertisements, outside  
16 of national advertising campaigns, directed toward the media market  
17 containing the Plaintiff, properly should be handled in the context of  
18 general discovery. Otherwise, Defendants may be required repeatedly to  
19 produce to the same materials for Plaintiffs residing in the same general  
20 geographic area. Request number 11 also fails as not identifying any  
21 particular information - it is a catchall provision which the Court cannot  
22 endorse or effectively enforce.

23 Requests 7 and 8 relate to communications with Plaintiff's health  
24 care providers about the product, not about the Plaintiff. Those requests  
25 similarly should be part of general discovery regarding Defendants  
26 communications with health care providers.

27 Requests 6 and 9 concern communications regarding the particular  
28 Plaintiffs. Those communications certainly may be relevant. To the

1 extent that Defendants' databases reflect such communications, they  
2 must be produced with the DFS. For cases selected for in-depth  
3 discovery, such communications as may exist in custodial files must also  
4 be produced.

5 Conclusion

6 Plaintiffs' motion to modify the PFS process is **DENIED**. The stay  
7 granted to Plaintiffs in submitting a PFS for cases filed after November  
8 25, 2013, is hereby lifted. Inasmuch as the stay lasted approximately  
9 thirty days, Plaintiffs are accorded an extra thirty days in each case filed  
10 after November 25, 2013, and the date of this Order, to submit the PFS  
11 to Defendants. The parties may, if they choose, agree to a different  
12 schedule and may submit a proposed Order to that effect to the Court.

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